

Leslie Halligan
Hearing Officer
1705 Cyprus Ct.
Missoula, MT 59801
Phone (406) 721-3399

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
DENISE JUNEAU
STATE OF MONTANA

IN THE MATTER OF [student])	
)	OSPI 2012-01
)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND ORDER RE: REMEDY
)	

BACKGROUND

On or about January 20, 2012, Petitioner **, acting under the provisions of a Specific Power of Attorney, requested a due process hearing for [student] against Respondents ** (“youth correctional facility (YCF)”), the Montana State Prison (“MSP”), and the Montana Department of Corrections (“MDOC”; “MDOC” also refers collectively to all three entities except where necessary to distinguish). On January 31, 2012, the Office of Public Instruction appointed Hearing Officer Leslie Halligan. Mediation efforts on June 11, 2012 were unsuccessful. On August 19, 2012, the parties stipulated to a bi-furcated hearing with the initial hearing being limited to the issue of whether [student] was denied a free appropriate public education (“FAPE”), both procedurally and substantively, while incarcerated at [the YCF] from May 7, 2010 to May 12, 2011, since he has been incarcerated at MSP beginning May 12, 2011 and continuing thereafter. In

the event it was determined that there was a denial of FAPE, the parties stipulated to the scheduling of a second hearing to determine an appropriate remedy.

The initial hearing was held on August 29, 30 and 31, 2012. This Hearing Officer's decision on the first segment was issued November 10, 2012. *See Matter of ***, OSPI No. 2012-01, *Findings of Fact, Conclusions of Law and Order*, November 10, 2012 ("** Order 11/10/12"). The second segment of this bi-furcated matter was conducted on February 20 and 21, 2013. The parties agreed at the time of hearing to extend the date for final resolution, pursuant to 34 C.F.R. § 300.515(c), until April 29, 2013; later the parties agreed to extend this date until May 15, 2013.

During the second hearing, [student] was represented by Andrée Larose, Morrison, Motl & Sherwood, PLLP; and MDOC was represented by Mary Elizabeth "Marilee" Duncan, Felt, Martin, Frazier & Weldon, P.C., and Ben Reed, MDOC staff attorney.

[Student] called the following witnesses: Mike Jakupcak, Ed.D. ("Dr. Jakupcak"), who was offered and qualified as an expert witness; ** ("Petitioner" or "Ms.**"), designated attorney-in-fact for [student] since September 2011; Bowman Smelko, Psy.D. ("Dr. Smelko"), who was offered and qualified as an expert witness in Petitioner's case-in-chief and in rebuttal; Kevin Creeden ("Mr. Creeden"), ** Academy (by telephone); Silvia Mangel ("Ms. Mangel"), Former Director, Great Divide Educational Services Cooperative, rebuttal witness; and Larry J. Burke ("Mr. Burke"), Education Director, MSP, rebuttal witness.

MDOC called the following witnesses: Diana Lee Zbinden ("Ms. Zbinden"), Education Coordinator at MSP; ** ("Mr. **"), Superintendent, ** High School; Ms.

Mangen, Former Director, Great Divide Educational Services Cooperative; Mr. Burke, Education Director, MSP; Tiffany Morrison ("Ms. Morrison"), Teacher for [student] at MSP; Cynthia Davenport ("Ms. Davenport"), Human Services Officer and Americans with Disabilities Act ("ADA") Coordinator, MSP; Jill Dee Buck ("Ms. Buck"), Mental Health Director, MSP; Tom Nielson ("Mr. Nielson"), Sex Offender Treatment Therapist at MSP; Stacy Fortner ("Ms. Fortner"), Clinical Therapist at MSP; Samuel Todd Casey ("Mr. Casey"), Reentry Manager, Montana Correctional Enterprises ("MCE"); Cathy Gordon ("Ms. Gordon"), Adult Felony Compact Administrator, Interstate Bureau, MDOC.

The Hearing Officer received into evidence by stipulation or without objection the following exhibits: Petitioner's Exhibits K and N; and Respondent's Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17. The Hearing Officer received into evidence over objection the following exhibits: Petitioner's Exhibits J, L, M, O, P, T, Q, and S. All remaining proposed exhibits identified by the parties were not offered or admitted into evidence.

[Student], through Petitioner, seeks compensatory education as an equitable remedy for MDOC's failure to provide FAPE from September 2010 through November 2012, the date of the initial order, ** Order 11/10/12. More specifically, [student] seeks an award of compensatory education for four (4) years, with placement of [student] at ** Academy in [out-of-state].

The MDOC asserts that compensatory education services, if awarded, should be provided by MDOC at MSP. The MDOC, by participating in these proceedings, did not waive its right to appeal the ** Order 11/10/12 and reserved its right to seek reversal of

the finding that MDOC failed to provide FAPE to [student] .

As supported below, [student] is entitled to an award of compensatory services not only to compensate for procedural violations resulting in losses of educational opportunities, but also for a substantive failure to provide FAPE.

The following findings of fact and conclusions of law supplement and do not supersede the ** Order 11/10/12.

FINDINGS OF FACT

1. Findings of Fact that also constitute Conclusions of Law are incorporated in the Conclusions of Law by reference. Likewise, Conclusions of Law that also constitute Findings of Fact are incorporated in the Findings of Fact by reference.

2. This hearing officer previously determined that MDOC failed to provide [student] FAPE from September 16, 2010 through November 10, 2012. [** Order 11/10/12, Conclusion of Law (“COL”) ¶ 69]. The Individualized Educational Program (“IEP”) developed for [student] at [YCF] at ** denied [student] FAPE both procedurally and substantively. The procedural violations denied meaningful parental participation and deprived [student] of educational opportunities. The IEP was not reasonably calculated to provide [student] meaningful educational benefit. From the time he was placed at MSP in May 2011 through the date of the initial order in November 2012, MDOC did not develop an IEP for [student] and did not provided special education and related services for [student]. ** Order 11/10/12, COL ¶¶ 29, 34, 35, 42, 46, 51, 64, 65].

3. The IEP and the placement of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may be modified if the State demonstrates a bona fide security or compelling penological interest that cannot otherwise be accommodated. 34 C.F.R. 300.324(d)(2)(i). In these proceedings, [student] was not charged as an adult, but was adjudicated as a delinquent youth and a serious juvenile offender. Nevertheless, [student]'s failures to complete sexual offender treatment has moved him through the juvenile delinquency system to arrive at the most restrictive correctional placement, incarceration at MSP. The requirement that [student] be placed in the least restrictive environment for educational services under IDEA cannot be satisfied, as a practical matter, because of the more restrictive placement ordered by the Honorable District Court Judge *** in the delinquency matter. [Findings of Fact, Conclusions of Law and Order, May 6, 2011, DJ-07-005(A), Ex. J-1, 111-117, ("District Court Order")].

4. Evidence was presented as to the type and scope of special education and related services [student] needs, as well as the setting in which these services should be provided. Testimony also was offered in regard to MDOC's efforts to comply with the ** Order 11/10/12 and the treatment and educational services provided to [student].

5. The MDOC's violations of the Individuals with Disabilities Improvement Act of 2004 ("IDEA"), 20 U.S.C. § 1400 *et seq.* (2004), have resulted in harm to [student]. He regressed in some academic areas. [** Order 11/10/12, COL ¶ 42]. He failed to make progress in other areas, such as reading comprehension, processing abilities, math, social interaction skills, behavior, sexual boundaries, communication and vocational

skills. Compensatory education services are necessary in all those areas. [Jakupcak, Tr. 442-457]. [Student] also needs as part of compensatory education the related services of occupational therapy, speech and language therapy, particularly in social pragmatics, and psychological counseling. [Jakupcak, Tr. 459-462]. Dr. Jakupcak explained in detail the topic areas in which he believes [student] requires compensatory education for denial of FAPE, including reading comprehension (drawing conclusions, suggesting inferences); reading social situations; specially designed instruction in written expression; math skills in percentages, decimals, and fractions, and applying those concepts to budgeting, finance, shopping, and adult financial demands. [Jakupcak, Tr. 446-447]. Dr. Jakupcak maintained that [student] also requires instruction in pragmatic language—how to use language and developing language strategies in social situations. What to say, when to say it, how to say it, and what words to use are critical. [Jakupcak, Tr. 450: 4-18; 451:5-8].

6. The IEP that was in effect for [student] prior to his transfer to [YCF] was developed at Southern Peaks Regional Treatment Center (“Southern Peaks”) in Canon City, Colorado, a residential treatment facility. This IEP was comprehensive and included transition services, postsecondary goals, specific IEP goals, a Behavior Intervention Plan, and accommodations/modifications. The Southern Peaks’ IEP provided [student] with special education and related services totaling (20) hours each week, administered directly by special education teachers; and indirect services which included ten (10) hours each week of special education support for regular education classrooms and one-half ($\frac{1}{2}$) hour a week of case management services. In contrast,

the IEP developed for [student] at [YCF] included a total of one (1) hour each week of special education and related services, specifically one-half ($\frac{1}{2}$) hour of service to address classroom behavior, and one-half ($\frac{1}{2}$) hour of special education in math. While [YCF] identified some accommodations for [student], the [YCF's] IEP failed to address [student]'s cognitive, social and emotional needs, and was not reasonably calculated to provide [student] meaningful educational benefit.

7. During his MSP incarceration, MDOC convened meetings related to [student]'s special education, but as of the date of the hearing, no IEP had been developed for [student].

8. IDEA requires transition services to be in effect when the child turns 16, or at a younger age if determined appropriate by the IEP Team, and updated annually, thereafter. 34 C.F.R. § 300.320(a). The IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals. *Id.*

9. IDEA provides an exception for the provision of transition services to a student who was convicted as an adult and whose eligibility under IDEA will end because of age or before the student will be eligible to be released from prison based on consideration of their sentence and eligibility for early release. [Student] was not convicted as an adult. Therefore, transition services should have been considered, established and

implemented for [student] as part of the [YCF] IEP, because he was placed at [YCF] after attaining age 16.

10. The evidence establishes that [student] needs special education instruction and related services delivered in a particular manner – through experiential learning – due to his particular disabilities. Because of his learning difficulties and severe reading comprehension and academic fluency deficits, [student] needs specially designed instruction to learn core academics. Because of his autism and his trauma history, and resulting social, communicative and behavioral deficits, [student] needs specialized instruction, real-life experiences and interactions with a high level of supervision and constant coaching and feedback to develop pro-social behaviors that will enable him to live, work and potentially pursue higher education safely and successfully. Further, his behavioral programming must include appropriate treatment for his sexually abusive behaviors – treatment that specifically targets the variables related to [student]’s disabilities that contribute to his offending behavior. [Testimony Jakupcak, Tr. 466-474; Testimony Smelko, Tr. 545-54, 819-820, 822-831; Exhibit (“Ex.”) O, pp. 7-8; Testimony Creeden, Tr. 571-577, 578-603]. Teaching [student] appropriate sexual behaviors and boundaries also is a necessary part of his educational program. [Jakupcak, Tr. 452-453; Smelko, Tr. 534].

11. The MDOC presented evidence of existing education and treatment services provided to [student] at MSP. Staff who provided these services testified to their willingness to cooperate and collaborate with consultants and other treatment providers to address [student]’s specific needs. However, no specific proposal for

compensatory education was provided by MDOC at the hearing. MDOC could provide special education teaching, occupational therapy, speech language therapy and psychological counseling, and any other necessary services for [student] at MSP, by contracting with outside consultants, such as ** High School and Great Divide Education Cooperative, and Ann Garfinkle, Ph.D., a consultant in special education and expertise in autism spectrum disorders.

12. The MSP has a vocational education program that can provide training and re-entry services. [Casey, Tr. 758-773; Burke 667-671]. Larry Burke, Education Director, testified that MSP could hire an aide/paraprofessional trained by a psychologist or Asperger's specialist to work alongside [student] for vocational education and training, and to provide ongoing guidance and assistance, just as special education aides or paraprofessionals provide in schools and other treatment facilities. [Burke, Tr. 668-671]. Opportunities for vocational education depend on safety and security issues, custody level, supervision, in addition to interests and aptitudes. Mr. Burke explained, "some of these jobs are just exactly like what you do on the outside." [Burke, Tr. 671:3-5].

13. Dr. Jakupcak was of the opinion that aspects of vocational skills development and transition services could be provided in a restrictive environment, such as Montana State Prison, using video tapes and other methods of showing the real world environment. [Jakupcak, Tr. 454-455, 588-589].

14. Cynthia Davenport, MSP Human Resource Officer and ADA Coordinator, testified that MSP can address [student]'s needs, in a manner that will fit the way that he

learns by engaging outside experts. She testified that video-conferencing has been used in other situations to provide accommodations for inmates and could be used if necessary. [Davenport, Tr. 705-711]. She has worked to provide [student] with some resources to assist in his programming, including a word processor and a white board. [Davenport, Tr. 704].

15. MSP provides all manner of mental health services for inmates. Jill Buck, MSP Mental Health Director and a psychiatric nurse, described the staffing and services which are provided. She confirmed that there are mental health care providers on staff who are trained to address post-traumatic stress disorder (“PTSD”) issues and social adjustment issues. Ms. Buck further testified that her staff is prepared to be trained and to work with any consultants or experts in autism spectrum disorders to enhance the care that is provided to [student]. [Buck, Tr. 718-719].

16. Stacy Fortner, [student]’s current clinical therapist, has some experience with individuals with his diagnoses. Ms. Fortner explained that [student]’s therapy thus far has been relationship building, and helping him with very basic issues, including helping with his social skills and boundaries, expressing feelings, and understanding feelings that other people express. She is working with him to think of and understand things in a different way, using visual aids and other visual learning methods. She plans to refer him for trauma therapy to other professionals in MSP, such as psychologist Katherine Flynn, once he has developed some basic coping skills. [Fortner, Tr. 744-747].

17. Compensatory education should include ongoing counseling to assist with basic coping skills and social adjustment issues, which will eventually include therapy for PTSD. Because mental health treatment services normally would be provided to [student] as a component of his incarceration, these services should not be credited as part of a compensatory education award. However, any mental health service provided by MDOC that would not be regularly provided to [student] or that supplements his regular services could be credited as part of a compensatory education award.

18. Tom Nielson, [student]'s sex offender treatment provider at MSP, has a background in special education and working with disabled sex offenders. He has worked as a treatment provider for adolescents and young adults in residential and outpatient settings, and has worked with sex offenders with developmental disabilities. Mr. Nielson currently works with the special needs pod at MSP, which consists of individuals identified with specific learning disabilities, mental retardation, or autism spectrum disorder. [Nielson, Tr. 726-733].

19. Tom Nielson understands and has worked with the team approach that is necessary when providing special education and services. He understands the need to provide individualized treatment that takes into consideration the person's own requirements and deficits. He has considerable experience working with people on the autism spectrum, but does not consider himself an expert. [Nielson, Tr. 727-732, 732:18-20]. Mr. Nielson is willing to work with a certified special education teacher, an expert on Asperger's, and any other consultants to modify his method of teaching the program to accommodate [student]. [Nielson, Tr. 734-735].

20. Mr. Nielson has made and continues to make adjustments to the method of conducting [student]'s sex offender treatment. He currently is using a modified version of the Brown program (which is directed toward adolescents and young adult offenders) as the sex offender treatment curriculum for [student]. Mr. Nielson indicated that to implement sex offender treatment with [student] using an experiential model, the process will require much more verbal and much more visual instruction. For [student], Mr. Nielson recommended using a more integrated process, making certain that when a concept was identified, resources would be used to educate [student] on that concept, and then efforts would be made to move [student] toward mastery learning before another concept was introduced. Mr. Nielson also explained that sex offender treatment and accountability cannot be effectively provided until the individual learns the proper social skills and the proper concepts and has an understanding of those skills. Mr. Neilson was of the opinion that the sex offender treatment program at MSP would need to be modified to address [student]'s individual strengths and needs, and that the delivery of treatment would be a slow process. While Mr. Neilson was unable to estimate the time it would take to deliver the modified program to [student], he indicated that the standard sex offender treatment program was a twenty-four (24) month program. [Neilson, Tr. 736-739].

21. Bowman Smelko, Psy.D., an experienced sex offender therapist and clinical psychologist, opined that the sex offender treatment provided at MSP is not appropriate for [student] because it is based on treatment protocols for adult offenders and does not take into consideration the behaviors exhibited by [student] which may be

associated with his disability. [Student] offended at age 14 and, since that time, [student] has consistently failed in treatment programs that followed the cognitive model for conduct-disordered individuals.

22. The MDOC's model for sex offender treatment is designed for persons who committed sexual offenses as adults, who are cognitively able to comprehend the curriculum, and whose offending behavior is triggered by anti-social thinking and criminogenic need. Although [student]'s pathway to inappropriate sexual behavior is linked to his social impairment and immaturity, and possibly his Asperger's, PTSD or trauma history, he has been treated both at [YCF] and at MSP as a conduct disordered individual. Because of his own social deficits, [student] looks to others as to how to behave appropriately. At MSP, his role models are antisocial adults. [Smelko, Tr. 538-539; Ex. O, pp. 7-8]. According to Dr. Smelko, MDOC's approach to sex offender treatment is not only ineffective for [student], it actually will increase, rather than decrease, the risk that [student] will sexually offend in the future. [Smelko, Tr. 539].

23. Dr. Smelko specifically identified a number of reasons why the sex offender treatment at MSP is inappropriate for [student]. First, the program does not address [student]'s social limitations and naiveties related to his disabilities of autism and PTSD that are the pathways to his sexual offending behavior. The program is designed for conduct-disordered individuals who offend as a result of criminogenic need. An entirely different approach is needed for a person with autism. Second, the program is designed for men who committed sexual offenses as adults, but [student] committed his offense at age 14. Third, the entire format and approach in the current

sex offender treatment program has not been, and will never be, effective in teaching [student] self-regulation and control of inappropriate sexual behaviors. [Student] needs to learn experientially – through supervised social interactions and experiences in real-life settings, where he is given constant coaching, feedback and supervision. Fourth, the model used by MSP (and [YCF]) relies primarily on written formats of communication, such as treatment workbooks with independent reading and writing assignments. Given [student]’s significant academic deficits and impaired reading levels and comprehension, this is an inadequate medium of intervention. [Smelko, Tr. 533-540, 545-553; Tr. 818-822, 826-831, 834-836; Ex. O, pp. 7-8].

24. Dr. Smelko testified that it would not be possible in the prison setting to provide the experiential type of behavioral training [student] needs to address his sexual behaviors. [Student] needs to be treated in a setting where he can be provided opportunities to socially interact and build positive relationships with peers and adults in a real-life, community settings, with security provided through supervision and positive redirection and feedback. The prison does not afford these types of opportunities. [Smelko, Tr. 535-540, 548-549, 551-553, 829-836].

25. Dr. Smelko testified that [student]’s sexual victimization and recurring placements in solitary confinement for safety reasons at MSP is not conducive to learning. When [student] is focused on survival, he is not available for higher learning. Continued incarceration at MSP reinforces dysfunctional and aberrant sexual behavior, rather than exposing him to healthy sexual perspectives. Lastly, continued placement at MSP further exacerbates and perpetuates his trauma history (abuse, neglect and

sexual victimization) and the harm he has suffered as a result. [Smelko, Tr. 538-540, 545-546, 548-549; Palmquist, Tr. 500-501; Creeden, Tr. 598-599].

26. [Student] should be released from MSP so that he can receive effective sex offender treatment and rehabilitative services in the delinquency case, and receive appropriate special education and related services as part of an award of compensatory education.

27. The District Court Order requires [student] to complete Phases one and two of the sex offender program at MSP before being considered for parole. However, as a juvenile sex offender, [student]'s actual risk level is below that which is typically necessary for an adult inmate to be placed on parole. According to Dr. Smelko, [student]'s risk level is so low it is more akin to the risk levels of adult offenders convicted of sexual offenses who are placed on probation as opposed to ever going to prison. [Smelko, Tr. 835-836, 540-541]. Therefore, it is reasonable to consider [student] immediately for parole or release from MSP.

28. [Student] has proposed placement at ** Academy, a private residential school and treatment facility [out-of-state] that specializes in providing special education instruction and related services to adolescent and young adult males with autism or other developmental disabilities and trauma histories who have exhibited sexually abusive behavior. [Palmquist, Tr. 500]. ** Academy uses a trauma-focused developmental approach. The treatment areas are self-regulation, attachment, cognitive skills, social skills, adaptive living skills, and healthy sexuality. [Creeden, Tr. 574:7-16].

29. Dr. Smelko recommended that [student] be placed at ** Academy because

it provides the treatment [student] needs. According to Dr. Smelko, [student]'s greatest chance of success is in the intense educational and treatment program offered by ** Academy. [Smelko, Tr. 836].

30. ** recommended placement of [student] at ** Academy because his needs are extremely unique, beginning with "trauma that he experienced as a young child. That changes the hardwiring in a child's brain," in addition to his Asperger's and other learning disabilities. She testified that MSP is not equipped to give him what he needs. [** , Tr. 499:22-25, 500:1-13].

31. [Student] has applied to and been accepted by ** Academy. While [student]'s IQ is higher than most students who are accepted into the program at ** Academy, Ben Allen, Director of Admissions, interviewed [student] and found that [student]'s specific functional disabilities were in line with youth in the program. While the placement may not be a "perfect fit" for [student], Mr. Creeden explained that the academy treats both youth who have autism spectrum disorder and youth with sexual behavior problems, and he indicated that academic services could be provided to [student] "that would continue to be challenging for him and, you know, move him forward developmentally in terms of his educational performance." [Creeden, Tr. 570:4-7, 571:1-17].

32. [Student]'s current placement at MSP Prison complies with the District Court Order, which transferred [student] from [the YCF] after he was determined to be in violation of the conditions of the prior dispositional order because he failed to complete sex offender treatment. Judge *** found [student] to be an untreated sex offender,

having a high risk to re-offend and needing to complete sex offender treatment at MSP. Judge *** transferred jurisdiction of [student] to the District Court, ordered [student] to be transferred to MSP, ordered that [student] not be eligible for parole until completion of Phases one and two of the MSP sex offender program, and that, upon parole, [student] would remain under the supervision of the Department of Corrections until age 25 or until discharged by MDOC. [Ex. J-1, 111-117].

33. [Student] has petitioned the District Court to modify the sentencing order pursuant to Mont. Code Ann. § 41-5-1422. Judge *** has taken the matter under advisement pending resolution of this matter. [Ex. N.]

34. The District Court has exclusive jurisdiction to modify [student]'s current dispositional order. This Hearing Officer has no jurisdiction to alter [student]'s dispositional order, to change [student]'s sex offender status, to alter [student]'s current correctional placement, or determine whether [student] should complete a different sex offender treatment program.

35. The District Court's dispositions have required [student] to complete sex offender treatment and have recognized [student]'s Asperger's diagnosis. However, [student] has not been successful in completing sex offender treatment at prior placements. Dr. Smelko was of the opinion that the lack of success in treatment may be related to the failure to appropriately modify the programs so that [student] could receive and understand the treatment concepts. [Student]'s lack of success also may be the result of a lack of motivation or the restrictions generally established in residential placement. Regardless, [student] has been unable to successfully complete the sexual

offender treatment programs offered to him and has been transferred to increasingly higher levels of supervision and restriction.

36. The District Court has an obligation to ensure the public safety and to ensure that [student] completes appropriate treatment prior to his discharge. However, after consideration of the testimony of Dr. Smelko and Mr. Neilson, the requirement that [student] complete Phases one and two of the sex offender program at MSP, prior to being considered for parole, places [student] in an untenable position. Dr. Smelko opined that the treatment provided by the MSP Sex Offender Program is inappropriate for [student] and will increase [student]'s risk to reoffender. Mr. Neilson testified that modifications in the current sex offender program will be necessary to ensure that [student] understands and can apply the treatment. Therefore, the District Court should modify the dispositional order so that [student] can receive appropriate sex offender treatment and to ensure that [student] does not pose a public safety risk upon his discharge.

37. The District Court should modify its current dispositional order in one of the following ways: A) to commit [student] to MDOC with a recommendation that he be placed at ** Academy; B) to commit [student] to MDOC with a recommendation that he be placed in a community-based program, with appropriate supervision, treatment and rehabilitative services; or C) to remove the requirement that [student] be required to complete Phases one and two of the sex offender program, and instead require that [student] complete an individualized sex offender treatment program with modifications in the curriculum so that

the treatment is appropriate for juvenile offenders and the method of teaching the curriculum is effective for [student] and accommodates his disability.

38. A student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services through an award of compensatory education.

39. Any remedy for denial of FAPE determined by this hearing officer must take into consideration the restrictions of [student]'s current correctional placement, and any possible modifications to his correctional placement and/or his possible discharge. Any award of compensatory education should be structured so that it can be provided in whatever placement [student] is found.

40. In reviewing the testimony and evidence presented, it is reasonable to award [student] compensatory education to compensate him for the special education and related services that were not provided to him after his placement at [the YCF] and during the periods of time in which he did not have an IEP while at MSP. This period extends between November 2010 and November 2012. The evidence supports an award of compensatory education for a period of two (2) years, in addition to regular special education and related services required under the IDEA so long as [student] is eligible. This compensatory award is based on the evidence that [student], due to his intellectual abilities, could have been expected to make progress at roughly the same rate as non-disabled peers had he been provided specialized instruction, and the fact that he was denied FAPE for a period of at least two (2) years. [Jakupcak, Tr. 447; [student] Order 11/10/12, COL ¶ 69].

41. Given MDOC's failure to develop a IEP for [student] that was in accord with the requirements of IDEA while at [the YCF] and after his transfer to MSP, MDOC should provide [student] with compensatory education that will address [student]'s deficits in reading comprehension, processing abilities, math, social interaction skills, behavior, sexual boundaries, communication and vocational skills, and related services to include occupational therapy, speech and language therapy (including instruction in pragmatic language) and psychological counseling.

42. Should the District Court modify [student]'s current dispositional order to commit [student] to DOC with a recommendation for [student]'s admission and placement at ** Academy for sex offender treatment and rehabilitative services, and [state] agrees to accept [student] for placement under the Interstate Compact provisions, [student]'s compensatory award should require MDOC to seek placement of [student] at ** Academy for a period not to exceed eighteen (18) months, followed by appropriate transition of [student] to a community placement with residential supports and appropriate wrap-around services for the remainder of the two (2) year compensatory award period. Placement of [student] at ** Academy would provide [student] with the opportunity to receive appropriate sex offender treatment services that would most effectively satisfy the need for public safety, while assuring that [student] would receive appropriate special education and related services to compensate him for the procedural and substantive violations that were established in [student]. Order 11/10/12.

43. Should placement of [student] at ** Academy not be possible, either because the District Court Order does not permit it or the Interstate Compact does not

approve his transfer, and the District Court modifies the dispositional order so that [student] is committed to DOC with a recommendation that [student] be placed in an appropriate community placement with supervision, sex offender treatment and the rehabilitation services, [student]'s compensatory award should require MDOC to place [student] in an appropriate community program, provide him with residential supports, and special education and related services which are provided by experienced professionals in the areas of need, as outlined in paragraph 42 above, for a period of two (2) years.

44. If [student] remains at MSP and cannot be released to ** Academy or a community-based placement within a reasonable period of time (six months), the award of two (2) years of compensatory education determined to be appropriate to compensate [student], should be converted to hours of direct service, so that the compensatory services can be implemented and recorded while he remains incarcerated at MSP. Given that [student]'s IEP at Southern Peaks provided a minimum of twenty (20) hours per week of direct service in special education and related services to [student] each week, it is reasonable to expect [student] to have received four (4) hours of direct service each day. Considering the number of days required for students in a regular school year, 180 days, it is reasonable to conclude that [student] is entitled to 720 hours of direct service for each year, for a total of 1440 hours of direct services in compensatory education and related service over a two (2) year period. These hours should be in addition to those services provided to [student] as a result of his correctional placement. For example, if [student] is required to complete sex offender treatment while at MSP, MDOC should not be credited for the current provision of sex offender treatment to [student] as part of the

compensatory award. However, for example, if MDOC provides [student] treatment services that exceed the regular schedule of sex offender treatment and enhance [student]'s understanding and comprehension of existing sex offender treatment or assist [student] in developing appropriate social behaviors and appropriate boundaries, these additional services could be included as part of the compensatory award.

45. While it may be extremely difficult to develop an appropriate program to compensate [student] for the violations of IDEA while he is at MSP, if there are no other options for [student] because of the requirements of the District Court's Order, MDOC should consult with Ann Garfinkle, Ph.D. and/or other qualified consultants, to identify and develop appropriate interventions to address [student]'s autism spectrum disorder and to develop appropriate special education and related services for [student] in the areas outlined herein that can be implemented while he remains at MSP. Additionally, MDOC should work with professionals who can assist in facilitating [student]'s re-entry or transition from MSP to an appropriate community placement once [student] is paroled or discharged. When [student] is released or discharged from MSP, any hours of service remaining as part of the compensatory award, should be provided to [student] in addition to other transition or re-entry services provided to him by MDOC.

46. With regard to modifications and/or enhancements to the sex offender treatment provided to [student] at MSP, MDOC should consult with Dr. Smelko or another similarly qualified professional, who can work with Mr. Neilson to develop an appropriate program for [student] that meets his individual treatment needs, reduces his risk for recidivism, and satisfies the sexual offender treatment requirement imposed by the

District Court.

47. The consulting professionals who are engaged by MDOC to implement the compensatory education and related services awarded to [student] should collaborate with each other so that the services are individualized, comprehensive and coordinated. It may be necessary to assign a coordinator or case manager to manage the delivery of the compensatory award services to [student] at MSP or in a community placement. Using the technology available at MSP, such as Vision Net, professionals may be able to provide direct service to [student] or may be able to consult more regularly and more efficiently.

48. While implementation of the award of compensatory education to [student] at MSP is the least preferred option for delivery of the compensatory award services, [student] should not be denied appropriate education and related services for an extended period while he is satisfying the requirements established by the District Court in [case#].

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this hearing officer are as follows:

1. The Findings of Fact that also constitute Conclusions of Law are incorporated in the Conclusions of Law by reference. Likewise, Conclusions of Law that also constitute Findings of Fact are incorporated in the Findings of Fact by reference.

2. A central purpose of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.* (2004) is “to ensure that all children with disabilities

have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A).

3. The IDEA provides that a hearing officer or a court “shall grant such relief as the court determines appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii).

4. Compensatory education can be awarded as an equitable remedy when a school district or state agency has failed to provide a free appropriate public education (“FAPE”). As the Ninth Circuit has held, compensatory education is “an equitable remedy, part of the court’s resources in crafting ‘appropriate relief.’” Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994); see also, Park v. Anaheim Union High, 464 F.3d 1025, 1033 (2006) (award of compensatory education services made); W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992) (reimbursement of privately obtained educational services ordered).

5. As previously held by this hearing officer, a court or hearing officer need not reach the question of substantive compliance if the court finds procedural inadequacies that result in the loss of educational opportunity or that caused a deprivation of educational benefits, N.B. v. Hellgate Elementary, 541 F.3d 1202, 1212-13 (9th Cir. 2008). Compensatory education services may be provided for the procedural denial of FAPE, to compensate for the possible loss of educational opportunity. J.T. v. Dept. of Educ., State of Hawaii, 2012 U.S. Dist. LEXIS 76115, *78-*79 (D.C. Hawaii 2012).

6. In this case, compensatory education services are necessary not only to compensate for procedural violations resulting in losses of educational opportunities, but also for a substantive failure to provide FAPE. As this hearing officer previously concluded, the IEP developed by [the YCF] in September 2010 failed to provide special education and related services designed to meet [student]'s unique needs. Subsequently, the failure of MDOC to develop an IEP, together with the failure to provide appropriate special education and related services, has resulted in a substantive denial of FAPE and educational regression. Compensatory education services as described herein are necessary and appropriate to remedy the harm caused to [student] as a result of both significant procedural and substantive denials of FAPE.

7. Once the need for compensatory education is established, the hearing officer is responsible for crafting an appropriate compensatory education award. It is not the responsibility of either party to determine the appropriate relief. It is an improper delegation of the hearing officer's authority to permit the IEP team or the parties to determine the scope of the compensatory education award. Meza v. Bd. of Educ. of the Portales Municipal Sch. (No. CIV 10-0963 JB/WPL, No. CIV 10-0964 JB/WPL), 2011 U.S. Dist. LEXIS 31061, *36-44 (D.C. New Mex. 2011) (Held hearing officer could not delegate authority to determine amount and type of compensatory education award to IEP team and/or consultant team); Reid, 401 F.3d at 526-27 (D.C. Circuit held hearing officer may not authorize IEP team to reduce or discontinue compensatory education award); see *a/so*, Bd. of Educ. of Fayette Cnty., Ky. v. L.M., 478 F.3d 307 (6th Cir. 2007)

(Sixth Circuit held the hearing officer may not delegate to a student's team the power to reduce or terminate a compensatory award).

8. The IDEA does not allow due process hearings to be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child. 20 U.S.C. § 1415(f)(3). An IEP team, in contrast, is statutorily required to include a representative of the local educational agency. 20 U.S.C. § 1414(d)(1)(B)(iv). Therefore, a delegation of power to the IEP team to decide the amount or scope of the compensatory-education award would, in effect, result in the IEP team exercising the hearing officer's powers." Reid, 401 F.3d at 526; L.M., 478 F.3d 317-18.

9. "Under the statute, the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions." Reid, 401 F.3d at 527 ("It makes no difference that the IEP team also includes non-employees such as Mathew's mother.").

10. "[T]he IDEA creates a complex structure that, while cumbersome, is designed to produce a result that takes into account the interests of a broad array of players in the state and local education regimes. Congress has separated the DPHO and the IEP Team, giving each separate roles. To collapse the two roles as the DPHO did has upset the careful balance that Congress created." Meza, 2011 U.S. Dist. LEXIS 31061, *44.

11. Some courts award a block of compensatory education equal to time lost while a school district denied a free, appropriate public education to a child with a

disability. See, e.g., Burr by Burr v. Ambach, 863 F.2d 1071 (2nd Cir. 1988), *vacated and remanded sub nom. Sobol v. Burr*, 492 U.S. 902 (1989), *reaff'd on reconsideration, Burr v. Sobol*, 888 F.2d 258 (1989). The Ninth Circuit holds, however, that courts and hearing officers have discretion on how to craft the relief and "[t]here is no obligation to provide a day-for-day compensation for time missed." Park, 464 F.3d at 1033, *quoting Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1496 (9th Cir. 1994). Rather, "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." Parents of Student W., 31 F.3d at 1497.

12. This flexible case-specific approach to compensatory education awards has been adopted in several circuits, including the Ninth, Eleventh and D.C. Circuits. Parents of Student W., *supra*; Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008); Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005). This more flexible approach will produce different results in different cases depending on the child's needs. Some students may benefit from intensive programs of a shorter duration. Others may need extended programs exceeding hour-for-hour replacement of time spent without FAPE. Reid, 401 F.3d at 524. Where there has been regression or where a student has learned counterproductive habits, compensatory education services greater in amount than the time in which FAPE was denied may be necessary to overcome the regression and counterproductive habits. Reid, 401 F.3d at 524-525.

13. Compensatory awards must accomplish more than the educational benefit a typical IEP provides – they must compensate for prior FAPE denials. Draper, 518 F.3d at 1289; Reid, 401 F.3d at 524-525.

14. A court or hearing officer enjoys “broad discretion” in fashioning appropriate relief for the denial of FAPE. Florence County Sch. Dist. Four v. Carter ex. rel. Carter, 510 U.S. 7, 16 (1993).

15. Courts and hearing officers have been creative in fashioning the amount and type of compensatory education services to award. R.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1126 (9th Cir. 2011). For example, the Ninth Circuit affirmed an order for additional training to enable the student’s teachers to be better able to meet his particular needs, finding the evidence was speculative that the student would benefit from additional direct services. Park, 464 F.3d at 1034. In Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712 (3rd Cir. 2010), the school district established a trust fund in excess of \$200,000 to provide compensatory education for 3 years past the student’s 21st birthday.

16. There is no requirement under the IDEA that the same agency that failed to provide FAPE must be the entity that actually delivers compensatory education. The trust fund in Ferren was available for the parents to purchase services from providers other than the Philadelphia school district.

17. When students move out of a school district that previously denied them FAPE, the responsible public agency must pay the cost of compensatory education provided at other places and by other providers. E.D. v. Newburyport Public Schools, 2011 U.S. App. LEXIS 17240 (1st Cir. 2011); Neshaminy Sch. Dist. v. Karla B., 1997 U.S. Dist. LEXIS 3849 (E.D. Pa. 1997); Alexis R. v. High Tech Media Arts Sch., 2009 U.S.

Dist. LEXIS 67078, * 20 (S.D. Ca. 2009); Lewis Cass Intermediate Sch. Dist. v. Edwardsburg Public Schools, 290 F. Supp. 832, 837-838 (W.D. Mich. 2003).

18. Thus, any argument by MDOC that it is only obligated under the IDEA to provide compensatory education so long as [student] remains at MSP lacks merit. See *a/so*, Providence Sch. Dept. v. Ana C. (C.A. No. 96-127-T), 1998 U.S. Dist. LEXIS 23503, *6 (D.C. R.I. 1998) (ordered compensatory services delivered in student's new home, in addition to regular IEP services she was receiving at her new school).

19. Because [student] is sentenced to an adult prison, there are other unique legal issues to consider. However, it is clear that under the IDEA, the MDOC can be ordered to pay for services provided as part of a compensatory award after [student] is discharged from MSP.

20. A student has the right to a private placement to receive compensatory education services, if that is the appropriate remedy for the harm suffered. Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1285-1286 (11th Cir. 2008) (upholding an award of six years of prospective compensatory education at a private placement). The 11th Circuit specifically rejected the school district's argument that the IDEA precludes an award of placement in a private school for compensatory education services. In so ruling, the 11th Circuit relied upon, and was consistent with, prior Supreme Court interpretations of the IDEA. Draper, 518 F.3d at 1285, citing Sch. Comm. of Burlington v. Dept. of Educ., 471 U.S. 359, 369 (1985). The Supreme Court held almost four decades ago that an award of reimbursement for the expenses of a private school is allowed under the IDEA when the private placement is appropriate for the student and

an educational program at a public school has been inadequate. Burlington, 471 U.S. at 369-370.

21. A student has the right to educational services and placement at a residential treatment facility, if such placement is necessary for the student to receive FAPE. Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1500-1502 (9th Cir. 1996) (Affirmed placement at residential treatment facility for exceptionally bright student with significant emotional and behavioral disabilities); Taylor v. Honig, 910 F.2d 627, 631-633 (9th Cir. 1990) (Injunction granted for student's placement at residential treatment facility with state approved school).

22. Where residential placement is necessary, it must be at no cost to the parents. "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.104 (2006).

23. The fact that [student] may become ineligible for IDEA services within the next two years does not preclude him from obtaining prospective compensatory education services. A student who has been deprived of FAPE has a right to compensatory education, regardless of his eligibility for current or future services under the IDEA, as a number of circuit courts have held. Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184, 189-90 (1st Cir. 1993); Burr v. Ambach, 863 F.2d at 1078 (2nd Cir. 1988), *vacated and remanded sub nom. Sobol v. Burr*, 492 U.S. 902 (1989), *reaff'd on reconsideration*, Burr v. Sobol, 888 F.2d 258 (2nd Cir. 1989); Lester H. v. Gilhool, 916

F.2d 865, 873 (3rd Cir. 1990); Jefferson County Bd. of Ed. v. Breen, 853 F.2d 853, 857 (11th Cir. 1986); see also, Zobrest v. Catalina Foothills School District, 125 L. Ed. 2d 1, 8, n.3, 113 S. Ct. 2462, 246, n.3 (1993) (Supreme Court held a student's claim presented a live controversy, notwithstanding the fact that he had graduated from high school and was no longer eligible for services under the IDEA.)

24. In determining the appropriateness of a private placement vs. a public agency's school setting, the relevant question is not whether the student could in theory receive an appropriate education in the public school setting, but whether he will receive such an education. Ridgewood Bd. of Educ. V. N.E. ex rel. M.E., 172 F.3d 238, 248-249 (3rd Cir. 1999).

25. In this case, both factors identified in Ridgewood support private placement at ** Academy. First, the private residential placement is appropriate. Second, MDOC has failed to provide an adequate program, does not have a specific proposal for compensatory education services, and will be faced with almost insurmountable obstacles with any plan to deliver appropriate compensatory education to [student] in a correctional setting, especially considering the individualized services needed to address [student]'s educational, social and behavioral treatment needs.

26. [Student] established the appropriateness and necessity of placement at ** Academy for compensatory education. MDOC presented evidence about the services MSP might be able to provide for a remedy, but did not specify a plan for delivery of appropriate compensatory services to [student].

27. [Student]’s need for “a highly structured environment in which academic skills are taught as well as where personal and social contacts are an ordinary and necessary element of the surroundings,” necessitates placement in an appropriate residential treatment and educational facility. Taylor v. Honig, 910 F.2d at 633; see also, Seattle v. B.S., 82 F.3d at 1500-1502. ** Academy provides the necessary social experiences and peer interactions, with a high level of structure and supervision so that [student] can learn effectively, in the manner in which he needs to learn, taking into consideration his learning impairments, trauma history, mental health diagnoses and Asperger’s disorder.

28. ** Academy is an “educational placement” for [student] under the IDEA, consistent with factors identified by the Ninth Circuit. The Academy operates a full-time school, is accredited by the state in which it operates, has other students who have been placed there to receive FAPE under the IDEA, and has the facilities to provide an integrated program of education and other supporting services. It is not an acute care facility for medical or psychiatric crises. Taylor v. Honig, 632-633; *compare* Clovis Unified Sch. Dist. v. California Office of Administrative Hearings, 903 F.2d 635, 645-646 (9th Cir. 1990) (Child’s placement in hospital for acute psychiatric crisis not an educational placement).

29. ** Academy, in particular, has been identified by name as an appropriate educational placement under the IDEA for students with sexually abusive behaviors who need special education and related services. Mohawk Trail Regional Sch. Dist. v. Shaun D., 35 F. Supp. 2d 34, 42-45 (D.C. Mass. 1999) (Placement of student with

sexually inappropriate behaviors at ** Academy held to be a necessary educational placement under the IDEA).

30. In the Mohawk Trail case, the court concluded that “the services [the student] needed to accomplish his social conduct and peer relationship goals could only be met at ** Academy.” Mohawk Trail, 35 F.Supp. 2d at 43. Similarly, the record here establishes that the services [student] needs to accomplish social conduct and peer relationship skills can effectively be met at ** Academy. As with the student in the Mohawk Trail case, [student]’s goals also include increasing his academic functioning, developing functional life skills and implementing an effective relapse prevention plan for sexually inappropriate behaviors. Mohawk Trail, 35 F.Supp.2d at 39.

31. Just as residential placement at ** Academy is an option for the delivery of FAPE, it is an option for compensatory education services. This hearing officer has the authority to order placement of [student] at ** Academy for the period of time necessary to remedy the educational harm caused as a result of the denial of FAPE, at MDOC expense.

32. If residential placement and services provided at ** Academy cannot be implemented because of the correctional orders that have been imposed in by the ** Judicial District Court in [case #], the next appropriate option for [student] is to receive compensatory education and related services in a community-based placement with appropriate, individualized services provided by qualified professionals in [student]’s identified areas of need, as previously outlined, for a period of two (2) years.

33. While compensatory education services provided by MDOC at MSP would

be the least appropriate option for implementing an award of compensatory education for [student], consideration of this option cannot be ignored given the requirements of the District Court's Order. Because of the inherent difficulties in providing the experiential teaching [student] needs to develop his social conduct and peer relationship skills in the prison setting, MSP will be challenged to find and engage appropriate professionals (including a qualified special education teacher and related services staff), and to develop a system that can deliver compensatory education and related services to [student] in the prison setting. The very "adaptations" needed – real life community experiences and development of positive relationships with peers – cannot occur in the correctional setting with its unique type of security requirements and its population of many anti-social peers who serve as poor role models. [Smelko, Tr. 537-538; Ex. O, pp. 7-8; Palmquist, Tr. 500-501].

34. An Order requiring MDOC to place [student] at ** Academy is a remedy that will effectively meet [student]'s needs and provide him the remedial instruction and functional life skills that would compensate him for past IDEA violations and serve as an appropriate educational placement, while satisfying the correctional objectives of the District Court. The roadblock to implementation of this appropriate and necessary remedy is the District Court Order that places [student] at MSP and requires that he complete Phases one and two of the sex offender program at MSP before he is eligible for parole. As described above, [student]'s continued participation in that program likely will cause harm to [student] and increase the risk to the community, rather than decrease it.

35. [Student] has petitioned District Court Judge *** to modify the dispositional order in [case #] pursuant to Mont. Code Ann. § 41-5-1422. Judge *** has taken the matter under advisement, preferring to hear first whether this hearing officer determines that placement at ** Academy is appropriate to meet [student]’s needs. In so doing this, Judge *** stated on the record “I think we all would agree that the bottom line here is what’s best for this boy, for [student], that can practicably and reasonably be done to give him a chance at life, which right now is in limbo.” [Ex. N, Judge ***, Tr. pp. 126-127].

36. Although this hearing officer cannot modify the District Court Order, alternatives have been outlined for implementation of an appropriate compensatory award for [student] in a variety of possible placements that may be ordered by the District Court.

37. After considering the facts, the Hearing Officer strongly recommends that modifications to the District Court order be implemented to effectuate the most appropriate remedy for [student], an award of compensatory education that allows for placement of [student] at ** Academy in [state] for a period not to exceed eighteen (18) months, followed by appropriate transition of [student] to a community placement with wrap-around services for the remainder of the two (2) year compensatory award period. If this program and placement is affirmed by the District Court, it also will further a fundamental purpose of the Youth Court Act, which is to provide a program of “supervision, care, rehabilitation, detention, competency development, and community

protection for youth before they become adult offenders.” Mont. Code Ann. § 41-5-102(2).

38. In light of the foregoing Findings of Facts and Conclusions of Law, the those Findings and Conclusions made in this hearing officer’s Order dated November 10, 2012, the appropriate remedy for [student] is an award of compensatory education and related services that encompasses a period of two (2) years, to be implemented by MDOC according to one of the three options listed below, listed in priority order, taking into consideration any restrictions imposed by the District Court in [case #]:

Option 1: Placement at ** Academy in Massachusetts: MDOC shall place [student] and pay the cost of [student]’s placement at ** Academy in [state] for a period of up to eighteen (18) months. During the two (2) year compensatory award period, MDOC shall pay the cost of special education and related services to be provided in all areas of need identified herein, including but not limited to academic instruction, services to develop social, behavioral, including sexually appropriate behaviors, communication, vocational and daily living skills, including recreational, independent living, and community integration skills, occupational therapy, speech-language therapy, and psychological counseling. The compensatory education services to be provided after discharge shall be developed by ** Academy, in conjunction with [student], his attorney-in-fact and MDOC and shall continue for the remainder of the two (2) year award period. The post-discharge services shall include residential support services, with opportunities for community activities, including employment, recreation and other community integration activities, with a level of coaching and supervision

determined by ** Academy to be necessary and appropriate at the time. These services during the two (2) year period shall be provided at no cost to [student], his parents or education agent

Option 2: Community Placement: MDOC shall place [student] in an appropriate community-based program, approved by [student] and his attorney-in-fact, which provides [student] with residential support services and appropriate compensatory services, as delineated in Option 1 for a period of two (2) years, at no cost to [student], his parents or education agent. MDOC shall pay for residential supports (room and board and program fees) and compensatory educational services to be provided in all areas of need identified in Option 1. The compensatory education services to be provided shall be developed in conjunction with the program staff, [student], his attorney-in-fact and MDOC. The post-discharge services shall include residential support services, with opportunities for community activities, including employment, recreation and other community integration activities, with a level of coaching and supervision determined appropriate and necessary by the parties, involved professionals, and program staff.

Option 3: Compensatory Award to [student] at MSP and upon release/discharge: If [student] cannot be released from MSP within a reasonable period of time (six (6) months), the award of two (2) years of compensatory education shall be converted to 1440 hours of direct service in the areas of special education and related services, as identified in Option 1, so that the compensatory award can be implemented and monitored while [student] remains at MSP. To implement the

compensatory award, MDOC shall consult with and engage appropriate professionals to develop and individualize the special education and related services for [student] in the areas identified in this Order. MDOC should consult with Ann Garfinkle, Ph.D. and/or other qualified consultants, to identify and develop appropriate interventions to address [student]'s autism spectrum disorder and to develop appropriate related services, such as occupational therapy, speech therapy and vocational services for [student] that can be implemented while he remains at MSP. MDOC should work with professionals who can assist in facilitating [student]'s re-entry or transition from MSP to an appropriate community placement once [student] is paroled or discharged. When [student] is released or discharged from MSP, any hours of service remaining as part of the compensatory award, should be provided to [student] in addition to other transition or re-entry services provided to him by MDOC. Lastly, MDOC should consult with Dr. Smelko or another similarly qualified professional, who can work with Mr. Neilson to develop an appropriate program for [student] that meets his individual treatment needs, reduces his risk for recidivism, and satisfies the sexual offender treatment requirement imposed by the District Court.

39. This hearing officer has heard all the evidence, weighed it thoroughly, and has determined that placements identified in the three options above, listed in the order of preference, as described herein, provide an appropriate compensatory education remedy for the MDOC's failure to provide [student] FAPE.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED:

1. [Student] is entitled to an award of compensatory education in all areas of need identified herein, including but not limited to academic instruction, services to develop social, behavioral, including sexually appropriate behaviors, communication, vocational and daily living skills, including recreational, independent living, and community integration skills, occupational therapy, speech-language therapy, and psychological counseling, for a period of two (2) years.

2. In the event the District Court modifies [student]'s dispositional order, or in the event [student] is discharged from MSP through any other means, MDOC shall immediately initiate the process for placing [student] at ** Academy in [state]. MDOC shall diligently and in good faith follow the process necessary for placement of [student] ** Academy, or alternatively in a community placement, so that [student]'s possible transfer is expedited.

3. MDOC shall pay the cost of placement at ** Academy, as outlined in Conclusion of Law ("COL") no. 38, Option 1, for so long as [student] is recommended for the program at ** Academy, but not for a period in excess of eighteen (18) months, followed by appropriate services in the community for the remaining months until the two (2) year award has been completed. Upon [student]'s discharge from ** Academy and for the remainder of the two (2) year period, MDOC shall pay the cost of compensatory educational services to be provided to [student] in all areas of need as identified herein. The compensatory education services to be provided after discharge shall be developed by ** Academy, in conjunction with [student], his attorney-in-fact and

MDOC. The post-discharge services shall include residential support services, with opportunities for community activities, including employment, recreation and other community integration activities, with a level of coaching and supervision determined by ** Academy to be necessary and appropriate at the time.

4. If [student]'s placement at ** Academy cannot be effectuated because of the District Court Order or the requirements of the Interstate Compact, MDOC shall place [student] in a community placement, approved by [student], his attorney-in-fact and MDOC, as outlined in COL no. 38, Option 2, and MDOC shall arrange and pay the cost of residential supports, program fees and compensatory educational services to be provided in all areas of need identified herein, as specifically outlined for a period of two (2) years. These services during the two (2) year period shall be provided by MDOC at no cost to [student], his parents or education agent.

5. If [student] cannot be placed outside the confines of MSP because of the District Court Order, then MDOC shall provide [student] with special education and related services in the areas of need as identified herein, for a total amount of 1440 hours of service, which represents a conversion of the two (2) year compensatory award into hours of direct services, while [student] is at MSP, and continuing upon [student]'s release or discharge from MSP, until the total hours of service have been implemented and delivered to [student]. The 1440 hours of direct services in the revised compensatory award shall be provided by MDOC at no cost to [student], his parents or education agent.

6. This hearing officer shall retain jurisdiction of this matter for a period of two (2) years to monitor implementation of the compensatory award. The parties shall report to this hearing officer by July 1, 2013, and every sixty (60) days thereafter, as to the status of compliance with and implementation of the compensatory education ordered herein, until such time as [student] has been placed at ** Academy or discharged into a community placement. Upon placement of [student] at ** Academy or in the community, the parties shall provide a report as to compliance every six (6) months after the date of placement until jurisdiction ceases or the compensatory award has been fulfilled.

Dated this 15th day of May, 2013.

/s/ Leslie Halligan
Leslie Halligan, Hearing Officer

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of May, 2013, a true and exact copy of the foregoing was send by electronic mail (as noted), and deposited for delivery by standard mail delivery to:

Andrée Larose
Morrison, Motl & Sherwood, PLLP
401 N. Last Chance Gulch
Helena, MT 59601
alarose@mmslawgroup.com

**

Marilee Duncan
Felt, Martin, Frazier & Weldon, P.C.
208 North Broadway, Suite 313
P.O. Box 2558
Billings, MT 59103
mduncan@feltmartinlaw.com

Ben Reed, Legal Counsel
Montana Department of Corrections
5 South Last Chance Gulch
P.O. Box 201301
Helena, MT 59620-1301
breed@mt.gov

Original was filed with:
Linda Brandon-Kjos
Officer of Public Instruction
Legal Division
PO Box 202501
Helena, MT 59620-2501

DATED this 15th day of May, 2013.

/s/ Leslie Halligan
Leslie Halligan, Hearing Officer